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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

**SITUATION IN UGANDA
IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**Decision on Defence Observations on the Preliminary Directions for any LRV or
Defence Evidence Presentation and Request for Guidance on Procedure for No-
Case-to-Answer Motion**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen* ('Ongwen case'), having regard to Articles 43(1), 64, 67, and 69 of the Rome Statute ('Statute'), Rules 78-79 and 140 of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion'.

I. Background

1. On 6 October 2017, the Chamber informed the participants and Registry of the hearing schedule from January to April 2018 ('Initial Hearing Schedule').¹
2. On 13 October 2017, the Single Judge set out directions for the presentation of evidence by the legal representatives for victims ('LRVs') and the defence for Mr Ongwen ('Defence') ('Preliminary Directions').²
3. The Preliminary Directions, *inter alia*, instructed the Defence to provide by 14 December 2017, for informational purposes, a preliminary list of witnesses and an estimate of the hours required for witness examination.³ The Defence was also instructed to provide certain information, including its final lists of evidence and witnesses, three weeks after formal notification of the conclusion of the Office of the Prosecutor's ('Prosecution') presentation of its evidence.⁴

¹ Email from Trial Chamber IX to participants and Registry of 6 October 2017 at 12.32. The Chamber informed the parties that it intends to sit on 15 January 2018 to 2 February 2018; 13 February 2018 to 2 March 2018; 12 March 2018 to 28 March 2018 and 9 April 2018 to 26 April 2018.

² Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021.

³ Preliminary Directions, ICC-02/04-01/15-1021, para. 3. The Preliminary Direction noted that the list may be changed up until the applicable deadlines for the final lists of witnesses and that subject to any subsequent order by the Chamber, redacting information from the other participants in these preliminary lists may also be done if strictly necessary.

⁴ The Preliminary Directions instructed the Defence to: (i) confirm its final lists of evidence and witnesses; (ii) certify that all necessary witness information forms have been completed and given to the VWU; (iii) provide

4. On 27 October 2017, the Defence filed observations on the Preliminary Directions and requested guidance on a procedure for a no-case-to-answer motion ('Request').⁵
5. On 31 October 2017, the Prosecution notified the Chamber and participants of the removal of eight persons from its list of witnesses ('Withdrawn Witnesses').⁶
6. On 1 November 2017, the Prosecution filed its response to the Request ('Response'),⁷ requesting that it be rejected.
7. The two teams of legal representatives of victims ('LRVs') filed a joint response to the Request on 3 November 2017 ('Joint Response'), requesting that it be rejected in part.⁸
8. On 6 November 2017, having received the Chamber's leave to reply,⁹ the Defence filed a reply to the Response ('Reply').¹⁰ The Reply modifies the initial Request. Across its two filings, the Defence requests (i) three weeks of break between each hearing block;¹¹ (ii) to submit its final list of witnesses and evidence on 1 June 2018 or three weeks after the Prosecution closes its case-in-chief, whichever is

anticipated testimony summaries for all witnesses; (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and (v) request any protective measures or relief under Rule 68 of the Rules. ICC-02/04-01/15-1021, paras 6-7.

⁵ Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-case-to-answer Motion, ICC-02/04-01/15-1029-Conf, with confidential annexes A-C (a public redacted version of this filing was notified on 8 November 2017). To the extent that this Decision makes reference to confidential filings, the Single Judge is of the view that information as referenced in this Decision does not warrant confidential treatment.

⁶ Email from the Prosecution to the Chamber and other participants on 31 October 2017 at 13.22.

⁷ Prosecution's Response to Defence Observations on the Chamber's Preliminary Directions and Request for Guidance (ICC-02/04-01/15-1029-Conf), ICC-02/04-01/15-1048-Conf. Note that the Chamber shortened the deadline for responses to 3 November 2017. Email from the Chamber to the participants on 30 October 2017 at 13.04.

⁸ Joint Response to the "Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-case-to-answer Motion", ICC-02/04-01/15-1056-Conf.

⁹ See Email from the Chamber to the participants on 3 November 2017 at 14.20. The Chamber instructed the Defence to limit its reply to the discrete changes the information contained in the Prosecution's email of 31 October 2017 makes to the meaning and intent of the Request.

¹⁰ Defence Reply to Prosecution Response ICC-02/04-01/15-1048-Conf, ICC-02/04-01/15-1064-Conf (a public redacted version was filed on 8 November 2017).

¹¹ Reply, ICC-02/04-01/15-1064-Red, paras 4(a) and 21. See also Request, ICC-02/04-01/15-1029-Conf, para 2(a).

later¹² and (iii) the issuance of directions for the conduct of the proceedings to permit the possibility of a no-case-to-answer motion following the presentation of evidence by the Prosecution and LRVs.¹³

II. Submissions and Analysis

Modification to the Initial Hearing Schedule

9. The Defence alleges that several grounds justify its request for modification of the Initial Hearing Schedule, including that: (i) Mr Ongwen's personal circumstances and health challenges impede his ability to help prepare his defence if the Initial Hearing Schedule is maintained;¹⁴ (ii) the time and facilities available to the Defence is inadequate and violates the principle of the equality of arms and the Defence team members' rights to health, family, and private life;¹⁵ and (iii) the Prosecution's removal of eight witnesses from its witness list actually increases the Defence's case load and investigative needs.¹⁶
10. The Prosecution opposes the Request, arguing that (i) the Defence's 'arguments that there has been (or will be) insufficient time for reasonable preparation under the current schedule is untenable¹⁷ and (ii) the Defence provides no evidence of direct relevance to support its arguments that 'the Accused's future ill health (or that of his legal representatives)' warrant a change in the hearing schedule.¹⁸
11. The LRVs submit that the initial hearing schedule may need some minor adjustments in order to be conducive to the continued effective participation of

¹² Reply, ICC-02/04-01/15-1064-Red, paras 4(b) and 26. *See also* Request, ICC-02/04-01/15-1029-Conf, para. 2(c).

¹³ Request, ICC-02/04-01/15-1029-Red, para. 2.

¹⁴ Request, ICC-02/04-01/15-1026-Conf, paras 11-17 and 28. To this end, the Defence avers that the Initial Hearing Schedule violates the Registrar's duty to ensure the health and safety of detainees.

¹⁵ Request, ICC-02/04-01/15-1026-Red, paras 18-28.

¹⁶ Reply, ICC-02/04-01/15-1064-Red, para. 15-21. The Defence submits that it must now work to determine the viability of the Withdrawn Witnesses becoming Defence witnesses.

¹⁷ Response, ICC-02/04-01/15-1048-Conf, paras 9-12.

¹⁸ Response, ICC-02/04-01/15-1048-Conf, paras 13-15.

the victims at trial and to the proper preparation of their presentation of evidence.¹⁹

12. While the Chamber is amenable to modifying the hearing schedule to allow for additional time between some sets of hearing blocks, the Defence's submissions do not justify a modification of the hearing schedule to the lengths requested.
13. Article 67(1)(b) of the Statute provides that an accused is entitled to have 'adequate time and facilities for the preparation of the defence'. Throughout the proceedings, the Chamber has been mindful of both this obligation and the Chamber's duty to ensure a fair and expeditious trial.²⁰ Indeed, Mr Ongwen has access to Acholi translations of statements and transcripts as least three months in advance of a witness's anticipated testimony, thereby allowing him ample time to instruct his Counsel.²¹ In any case, the Single Judge further notes that the witnesses whom the Defence argues have particularly voluminous transcripts have all been withdrawn.²²
14. Further, any concrete health challenges of Mr Ongwen to which the Chamber has been notified will continue to be addressed on a case-by-case basis to ensure both the fair and expeditious conduct of the proceedings and full respect for Mr Ongwen's rights. However, other than unsubstantiated and vague claims made in the Request, the Defence provides no concrete information as to how any health challenges faced by Mr Ongwen has or will compromise his ability to meaningfully exercise his fair trial rights given the hearing schedule. Indeed, Mr Ongwen has been a full and active participant in his defence.
15. As regards the resources available to the Defence, the Single Judge notes that the Defence offers examples of issues that allegedly have or will seriously hamper its

¹⁹ Joint Response, ICC-02/04-01/15-1056-Conf, para. 20.

²⁰ Article 64(2) of the Rome Statute.

²¹ See Response, ICC-02/04-01/15-1048-Conf, para. 10.

²² See Email from the Prosecution to the Chamber and participants on 31 October 2017 at 13.22.

progress in the field.²³ Many of these issues are matters to be properly discussed with the Registry.²⁴ From the submissions of the Defence,²⁵ it is clear that whatever disagreement exists between the Defence and the Registry, if any, has not risen to a stage that necessitates the Chamber's intervention.²⁶ In any case, the Single Judge encourages the Registry to liaise with the Defence to discuss the difficulties the Defence alleges in the Request.²⁷

16. Further, the investigative challenges the Defence foresees with the Withdrawn Witnesses are largely speculative. This is particularly so given that the witnesses at issue may decline to be interviewed by the Defence. Further, the Defence can and has undertaken investigative operations even while the Chamber is sitting.
17. As to the Defence's own rights, while the Single Judge sympathises with the difficulties faced by the Defence team, nothing raised in the Defence's submissions is outside of the ordinary challenges that can be anticipated in a case of this nature.
18. In light of the above, and in order to address the Defence's concern to fullest extent reasonable, the Chamber will amend the hearing schedule in part and hear testimony on the following dates in January-April 2018:

15 January 2018 to 2 February 2018

19 February 2018 to 2 March 2018

19 March 2018 to 28 March 2018

9 April 2018 to 13 April 2018

23 April 2018 to 26 April 2018

²³ See Request, ICC-02/04-01/15-1029-Red, paras 20-21 and Confidential Annex C to ICC-02/04-01/15-1029.

²⁴ See Article 43(1) of the Statute, Rules 20 and 21 of the Rules, Regulation 83 of the Regulations and Regulations 130-135 of the Regulations of the Registry.

²⁵ See Request, ICC-02/04-01/15-1029-Red, paras 20-21 and Confidential Annex C to ICC-02/04-01/15-1029.

²⁶ See Regulation 83(4) of the Regulations.

²⁷ To this end, the Single Judge notes that in an email to the Chamber and the Participants, the Defence noted that shortly after filing its Request, the Registry contacted the Defence about its issues with CaseMap. Email from the Defence to the Chamber and Participants on 30 October 2017 at 17.20.

19. The Single Judge also notes that the Chamber concludes the current hearing block on 1 December 2017 and the Defence also has the time between this date and the start of the next hearing block on 15 January 2018 to continue its investigations and preparations.

Revision of timelines contained in the Preliminary Directions

20. The Defence submits that the timelines given for the provision of information relevant to the presentation of the Defence case are prejudicial to Mr Ongwen's 'fair trial rights to an effective defence'.²⁸ The Defence submits that it does not envisage being prepared to provide the Chamber with a preliminary list of witnesses and an estimate of examination hours by 14 December 2017.²⁹
21. Further, the Defence submits that given the nature of the Prosecution case and how it has been presented, the Defence will require time to examine and evaluate the evidence and how best to proceed at the end of the Prosecution case and the LRV case, if any.³⁰ The Defence also submits that, based on the hardship which the Defence shall face in locating and interviewing some of the Withdrawn Witnesses, its final list of witnesses should be due on 1 June 2018 or three weeks after the Prosecution finishes its case, whichever is later.³¹
22. In the Response to the Request, the Prosecution argues that it cannot make any useful reply in the absence of concrete proposals from the Defence.³²
23. The LRVs argue that the Defence's contentions in relation to the time limit imposed in the Preliminary Directions appear to be without any justification.³³

²⁸ Request, ICC-02/04-01/15-1029-Red, paras 41-46.

²⁹ Request, ICC-02/04-01/15-1029-Red, para. 41.

³⁰ Request, ICC-02/04-01/15-1029-Red, paras 42-44.

³¹ Reply, ICC-02/04-01/15-1064-Red, paras 23-26.

³² Response, ICC-02/04-01/15-1048-Conf, para. 7.

³³ Joint Response, ICC-02/04-01/15-1056-Conf, paras 13-15.

24. Regarding the preliminary list of witnesses and estimate of witness examination time, the Preliminary Directions merely directs that the Defence inform the Chamber and the participants of the relevant information known to it as of 14 December 2017 for informational purposes. Indeed, as the LRVs note,³⁴ the Defence has previously mentioned the names of potential witnesses in previous filings.³⁵ The Single Judge fails to see how complying with such a deadline is burdensome, and further notes that the Defence may amend this information until the deadline for the final list of witnesses.
25. As to the deadlines for the final list of witnesses and other information related to the Defence's presentation of its case, the Single Judge is unconvinced by the Defence's arguments that the timelines given in the Preliminary Directions are prejudicial to Mr Ongwen's fair trial rights. The Pre-Trial Chamber confirmed the charges against Mr Ongwen on 23 March 2016. The Confirmation Decision and the Prosecution's Pre-Trial Brief provide the Defence with a detailed understanding of the Prosecution's case against Mr Ongwen.³⁶ Further, the Prosecution provided detailed summaries of the anticipated testimony of its witnesses as well as other attendant material related to the witnesses, including their written statements or transcribed interviews.
26. The Single Judge is of the view that with its advance knowledge of the Prosecution case, the Defence will have had sufficient time to devise its case in defence of Mr Ongwen by the conclusion of the Prosecution's case-in-chief. The

³⁴ Joint Response, ICC-02/04-01-15-1056-Conf, para. 14.

³⁵ See Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence (with annex), 9 August 2016, ICC-02/04-01/15-517; Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence", 9 August 2016, ICC-02/04-01/15-518; Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, 9 August 2016, ICC-02/04-01/15-519-Conf.

³⁶ This supplemented the information the Defence received during earlier stages of the case. *See for example* Notice of Intended Charges against Dominic Ongwen, 18 September 2015, ICC-02/04-01/15-305-Conf.

deadline set in the Preliminary Directions allows the Defence sufficient time to finalise its list of witnesses and provide the relevant information.³⁷

27. Much of the difficulties the Defence anticipates in meeting the deadline set in the Preliminary Directions are hypothetical and may not materialise. The Single Judge notes that, in exceptional circumstances and with sufficient cause, the Defence may request to extend the deadline for their lists of witnesses and evidence and other related information or to modify its list of witnesses and evidence after the presentation of the Defence case has begun.

Procedure for no-case-to-answer motion

28. The Defence, stating both that it intends to file a no-case-to-answer motion and that it *may potentially* file such a motion and request for acquittal of some or all of the counts against Mr Ongwen, requests the Chamber to issue further directions on the possibility of a no-case-to-answer motion from the Defence.³⁸ The Defence submits that at this point in the trial it is only in a position to argue the ‘theoretical appropriateness’ of the procedure for a no-case-to-answer and acquittal motion, but will be better placed to argue for the procedure at the end of the Prosecution case, or the LRV case, if any.³⁹
29. The Defence further submits that resolution of factual and legal issues arising from the Prosecution’s theory of the case may impact on whether there is a case to answer and the selection of witnesses and evidence for the Defence case.⁴⁰ The Defence argues that Mr Ongwen’s right to remain silent is also implicated and a

³⁷ In reaching this conclusion, the Single Judge has considered the addition of three mental health experts to the Prosecution’s list of witnesses. See Decision on Prosecution Request Related to Mental Health Expert Evidence, 14 November 2017, ICC-02/04-01/15-1073.

³⁸ Request, ICC-02/04-01/15-1029-Red, paras 29-31 (emphasis added).

³⁹ Request, ICC-02/04-01/15-1029-Red, paras 32-33.

⁴⁰ Request, ICC-02/04-01/15-1029-Red, paras 34-35. The Defence specifically raises two issues (i) Mr Ongwen’s assertion that he has not been given appropriate and reasonable notice of the crimes with which he has been charged and (ii) that the Prosecution has adduced evidence of crimes and conduct that fall out of the temporal, territorial and crime based jurisdiction.

no-case-to-answer motion would guard against Mr Ongwen answering a charge for which there is no prospect of conviction.⁴¹ The Defence argues that a partial acquittal of some charges would greatly streamline the Defence case by limiting the scope of its case to only those charges for which the Prosecution would have shown a *prima facie* case, thereby saving time and preventing the unnecessary calling of Defence witnesses.⁴²

30. The Prosecution argues that based on the information contained in the Request, the Chamber is not in a position to exercise its discretion and that devising and promulgating a procedure now would be premature.⁴³
31. The LRVs submit that the request for the issuance of directions for a no-case-to-answer motion is speculative and premature at the present stage of the proceedings.⁴⁴
32. The Single Judge notes the Appeals Chamber's holding that a Trial Chamber retains the discretion as to whether or not to conduct a no-case-to-answer procedure.⁴⁵
33. The Single Judge notes also that entertaining such a motion may result in a lengthy process requiring an evaluation of evidence by the Chamber, in contravention of the Chamber's specified approach to the consideration of the relevance and admissibility of evidence as set out in previous decisions.⁴⁶

⁴¹ Request, ICC-02/04-01/15-1029-Red, paras 36-40.

⁴² Request, ICC-02/04-01/15-1029-Red, para. 39.

⁴³ Response, ICC-02/04-01/15-1048-Conf, paras 16-20.

⁴⁴ Joint Response, ICC-02/04-01/15-1056-Conf, paras 10-12.

⁴⁵ Appeal Chamber, Prosecution v. Bosco Ntaganda ('Ntaganda case'), Judgment on the Appeal of Mr Bosco Ntaganda against the 'Decision on Defence Request for Leave to File a "no case to answer" motion', 5 September 2017, ICC-02/04-01/15-2026 (OA6), paras 52-56.

⁴⁶ See, *inter alia*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 25 March 2017, ICC-02/04-01/15-795; Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615 and Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

Further, a no-case-to-answer motion should only be entertained if the specific circumstances of the case warrant such action.⁴⁷

34. Having considered the Request, and mindful that the Defence is ‘only in position to argue the theoretical appropriateness of the procedure for a no-case-to-answer motion’,⁴⁸ the Single Judge takes no position on whether a no-case-to-answer motion will be entertained. The Single Judge will not regulate a procedure that even the moving party only considers to be ‘theoretically appropriate’.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REVISES the hearing schedule in line with paragraph 18 above;

REJECTS the remainder of this Request; and

ORDERS the LRVs and the Prosecution to request reclassification or file public redacted versions of the filings underlying this decision within 10 days after notification of the present decision.

⁴⁷ See *Ntaganda* case, Decision on Defence Request for Leave to File a ‘no case to answer’ Motion, 1 June 2017, ICC-02/04-01/15-1937.

⁴⁸ Request, ICC-02/04-01/15-1029-Red, para. 33.

Done in both English and French, the English version being authoritative.


Judge Bertram Schmitt,
Single Judge

Dated 16 November 2017

At The Hague, The Netherlands